No. 93-446

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HPY INC.,

Petitioner,

v.

ELECTRIC POWER AUTHORITY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 6, 1993

QUESTIONS PRESENTED

Whether a claim pursuant to 42 U.S.C. § 1983 should be dismissed with prejudice under Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted when Rule of Civil Procedure 9(b) does not require a heightened pleading standard for Civil Rights claims and a court is under a duty to examine the complaint to determine if the allegations provide relief on any possible legal theory under Rule 8(a) of the Federal Rules of Civil Procedure.

Whether a procedural due process claim is stated under 42 U.S.C. § 1983 when high level public corporation officials exercise broadly delegated power and authority enumerated under state enabling acts to effect a deprivation of a property interest, notwithstanding their duty to implement procedures to prevent the deprivation.

Whether a substantive due process claim alleged in a 42 U.S.C. § 1983 action is perfected at the time a person who while acting under color of state law, unreasonably and capriciously builds improvements on land knowingly belonging to another.

Whether a State's denial of intervention in State condemnation proceedings exhausts State remedies to perfect a claim for unjust compensation for a takings claim alleged in a 42 U.S.C. § 1983 action and pursuant to the Fifth Amendment to the United States Constitution.

LIST OF PARTIES AND RULE 29 LIST

The appellant in the case below is the petitioner herein, HPY Inc. ("HPY"). HPY was the plaintiff in the District Court action from which the appeal was taken.

The appellees in the case below are the respondents herein and include:

(1) Jose A. Del Valle, in his individual and official capacity as Director of the Electric Power Authority and The Electric Power Authority itself.

(2) Maria Margarita Irizarry, in her individual and official capacity as Director of the Aqueduct and Sewer Authority and the Aqueduct and Sewer Authority itself.

(3) Gamalier Rodriguez Mercado, in his individual and official capacity as Director of the Rural Housing Administration and the Rural Housing Administration itself.

HPY, INC. - a Delaware Corp., with offices at 1031 West Morse Boulevard, Suite 300, Winter Park, Florida, pursuant to F.R.A.R. 26.1 identifies all parent companies, and affiliates of the Plaintiff-Appellant:

a. Osceola Financial Corporation, a Nevada Corporation, is the parent company and owns 100% of the outstanding and issued shares of stock of the plaintiff-appellant, HPY, Inc.

b. James T. Barnes, Jr., 1987 Irrevocable Trust own 100% of the outstanding and issued shares of stock of Osceola Financial Corporation.

c. John E. Amerman, Esq., of Detroit, Michigan, is the trustee of the James T. Barnes, Jr., 1987 Irrevocable Trust; and
the sole beneficiary of the Trust is James T. Barnes, Jr., of the State of Florida.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29 LIST iii

TABLE OF AUTHORITIES viii

OPINION BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS . 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 12

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY AMONG THE COURTS OF APPEAL THE APPLICABILITY OF WHETHER *CHARLENE*

LEATHERMAN V. TARRANT COUNTY APPLIES WHERE A PLAINTIFF PLEADING A 42 U.S.C. § 1983 IS NOT REQUIRED TO PLEAD TO A HEIGHTENED PLEADING STANDARD BASED ON RULE 8(A)(2) AND 9(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE. 13

II. THE PETITION SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OUTLINED IN *ZINERMON V. BURCH* WHEN HIGH-LEVEL PUBLIC CORPORATION OFFICIALS EXERCISE BROADLY DELEGATED POWER AND AUTHORITY TO EFFECT THE DEPRIVATION OF A PROTECTED --PROPERTY INTEREST, NOTWITHSTANDING THEIR OBLIGATION TO IMPLEMENT PROCEDURES TO PREVENT THE DEPRIVATION COMPLAINED OF. 21

III. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE COURT OF APPEALS ON THE ISSUE OF WHETHER SUBSTANTIVE DUE PROCESS

CLAIMS AND TAKINGS CLAIMS SHOULD NOT BE HELD TO THE SAME RIPENESS STANDARD AS OUTLINED IN *WILLIAMSON COUNTY*. 34

IV. THE PETITION SHOULD BE GRANTED TO CLARIFY AN ERRONEOUS APPLICATION OF WILLIAMSON COUNTY TO A TAKINGS CLAIM WHERE ALL AVAILABLE STATE REMEDIES HAD BEEN EXHAUSTED. 47

CONCLUSION 53

APPENDIX 54

TABLE OF AUTHORITIES

CASES:

Allen v. McCurry, 449 U.S. 90 (1980) . 43,44

Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) 23

Bateson v. Geisse, 857 F.2d 1300 (Ninth Circuit 1988) 40

Bretz v. Kelman, 773 F.2d 1026, 1031 (CA9 1985) (en banc) . . . . . -25

Charlene Leatherman, et al., v. Tarrant County Narcotics Intelligence and Coordination Unit et al., 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) 17,18

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 . 28

Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) 15,17

Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 15

Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1987) . 41

Daniels v. Williams, 474 U.S. 327,
88 L.Ed.2d 662, 106 S.Ct. 662 (1986) . . . 39
Dewey v. University of New Hampshire,
694 F.2d 1, 3, *cert. denied*, 461 U.S. 944
(1982) 14,20
Fetner v. City of Roanoke, 813 F.2d
1183 (CA11 1987) 25
Foman v. Davis, 371 U.S. 178, 83 S.Ct.
227, 9 L.Ed.2d 222, (1962) 16
Freeman v. Blair, 793 F.2d 166, 177
(CA8 1986) 25
Fuentes v. Shevin, 407 U.S. 67,
92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) . . . 28
Gilbert v. *Cambridge*, 932 F.2d 51, 62,
cert. denied, 112 S.Ct. 192 (1991) 14
Goldberg v. Kelly, 397 U.S. 254,
90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) . . . 28
Greenbriar v. City of Alabaster,
881 F.2d 1570 (11th Cir. 1989) 37
Hudson v. Palmer, 468 U.S. 517 (1985) . . . 23
Logan v. Zimmerman Brush Co.,
455 U.S. 422, 102 S.Ct. 1148,

71 L.Ed.2d 265 (1982) 24

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S. Ct. 3164 (1982) 38,39

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) 23,28

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) 43

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 30

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) . . *passim*

Ochoa Realty Corp. v. Faria, 815 F.2d 812 (1st Cir. 1987) 41

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct.1908, 68 L.Ed.2d 420 (1981) . 24,48

Patterson v. Coughlin, 761 F.2d 886, (CA2 1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986) . . . 25

San Jacinto Sav. & Loan v. *Kacal*,
928 F.2d 697, 701 (CA5 1991) 31
Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F. 2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990) 35, 37, 40
United States v. Certain Real Property,
954 F.2d 29, 33 (2d Cir.) 39
University of Tenn. v. *Elliot*,
478 U.S. 788, (1986) 43
Watts v. Burkhart, 854 F.2d 839, 843
(CA6 1988) 25
Williamson County v. *Hamilton Bank*,
473 U.S. 172 (1985) 22
Wilson v. Civil Town of Clayton,
839 F.2d 375, 382 (CA7 1988) 25
Wolfenbarger v. Williams, 774, F.2d 358,
(CA10 1985) 25
Yee v. City of Escondido 112 S.Ct. 1522
(1992) 39
Zinermon v. Burch, 494 U.S. 545,
110 S.Ct. 975 (1990) 21

CONSTITUTION:

U.S. CONST. amend. V 3

U.S. CONST. amend. XIV § 5 5

U.S. CONST. amend. XIV, § 1 3

STATUTES:

22 L.P.R.A. Section 144(e) 22,24

22 L.P.R.A. Section 196(h) 22,24

28 L.P.R.A. Sections 525 and 526 . . . 22,24

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1738 42

28 U.S.C. § 2072(b) 18

42 U.S.C. § 1983 . . . . . *passim*

Federal Rule of Civil Procedure

12(b)(6) 7,14,15

Federal Rule of Civil Procedure Rule

8(a)(2) 13,15,17,18

Federal Rule of Civil Procedure

Rule 9(b) 18,19

Federal Rule of Civil Procedure

Rule 15(a) 16

SECONDARY AUTHORITIES:

3 Moore's Federal Practice para. 15.08[4], at 15-65 (2d ed. 1990) 16

Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 483 (1986) 20

W. Freedman, Res Judicata and Collateral Estoppel 11-30 (1988) 43

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner HPY Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on April 15, 1993 and the order denying a rehearing entered on May 11, 1993.

OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit ("Court of Appeals") affirming the dismissal of the complaint with prejudice is not reported and is reprinted in the Appendix at A-1. The Order of the Court of Appeals denying rehearing is not reported. That is reprinted in the Appendix at ~~A-6~~ A-9. The Court of Appeals affirmed the decision of the United States District Court for the District of Puerto Rico ("the District Court"). The District Court's opinion and order is not reported and is reprinted in the Appendix at ~~A-8~~ A-12 (hereinafter "App. at A-___").

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Court of Appeals affirming the dismissal by the District Court of claims made by petitioner arising under

the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on April 15, 1993. Petitioner's request for a rehearing by the Court of Appeals was denied in an order entered on May 11, 1993. This petition has therefore been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns petitioner's attempts to vindicate its rights to due process under the United States Constitution. The Constitutional provisions involved are the Fifth and Fourteenth Amendments. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

> public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

> States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Statutory provision involved in the case, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Procedural History

This case arises out of a dispute over the taking of land by squatters and various public corporations without just compensation and without due process of law in the City of Ponce in the Commonwealth of Puerto Rico. Petitioner's complaint was file on April 16,

1992 in the District Court under 42 U.S.C. § 1983. The complaint alleged, *inter alia*, that the respondent's had violated petitioners rights to procedural and substantive due process under the . Fourteenth Amendment and had violated petitioner's right to just compensation pursuant to the takings clause of the Fifth Amendment. Petitioner's complaint alleged deliberate misconduct by the respondents and because injunctive relief was sought, respondents have also.been sued in their individual capacities.

With the exception of the Electric Power Authority and its Director, respondents did not answer the complaint but rather moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. The motions were granted dismissing the complaint with prejudice. HPY filed a timely appeal. The Court of Appeals affirmed the dismissal on April 15, 1993.

Petitioner sought rehearing, which request was denied on May 11, 1993.

Facts Material to the Questions Presented

HPY owns five large tracts of land in Ponce, Puerto Rico in an area known as Canas Ward. In 1985, HPY had discovered that numerous squatters had invaded its land and had built shacks and other structures with the intent of remaining on the land. Because of the large number of squatters which by this time numbered into the hundreds, it was impracticable to remove the individual squatters one by one. Therefore, HPY filed an unlawful detainer complaint on October 9, 1986 in the Superior Court of Ponce, Puerto Rico, which rendered its final judgment in favor of HPY on June 4, 1991 and is included in the Appendix at ~~A-42~~ A-71.

Prior to the rendition of the final judgment of the unlawful detainer action, HPY filed an inverse condemnation claim against the

Commonwealth of Puerto Rico on November 20, 1987 (Appendix at ~~A-24~~ A-38). A condemnation claim was also filed by the Commonwealth of Puerto Rico for land near to HPY on October 10, 1988. During the period of time between the filing of the condemnation proceeding by the Commonwealth and a final determination of the inverse condemnation proceeding, the Rural Housing Administration sent a surveyor to prepare a certified survey of the plots of invaded land to include said measurement in the Commonwealth's expropriation proceeding.

As determined by an independent surveyor hired by HPY (App. at ~~A-63~~ A-111), the Rural Housing Administration's surveyor had used erroneous landmarks in his calculated assessment of the invaded property. This error resulted in land belonging to HPY to be included in the erroneous survey. (App. at ~~A-63~~ A-111) Based on the belief that the Commonwealth now had an intent to expropriate HPY's land, HPY requested a

voluntary dismissal without prejudice on June 6, 1989 because HPY believed that its land would be included in the pending expropriation proceeding filed by the Commonwealth. (App. at A-31) On April 20, 1990, a Judgment was issued granting the voluntary dismissal but did so by dismissing with prejudice. (App. at A-32).

HPY filed a motion to intervene in the Commonwealth's expropriation proceeding on March 30, 1990, (App. at A-33) which was denied on October 30, 1990. (App. at A-35) The Commonwealth maintained in its expropriation proceeding that it had no interest in expropriating HPY's land. (App. at A-36) Therefore, HPY continued to pursue its pending unlawful detainer action in Ponce, Puerto Rico.

Meanwhile, without prior notice or an opportunity to be heard, the Rural Housing Administration, under color of State law, granted the Aqueduct and Sewer Authority and the

Electric Power Authority, the authorization to provide utility and other miscellaneous services to the squatters including the building of structures in the assistance of same.[1]

HPY then filed a 42 U.S.C. § 1983 complaint in the District Court for the District of Puerto Rico, claiming that its procedural and substantive due process rights under the Fourteenth Amendment to the United States Constitution had been violated as well as its rights to just compensation pursuant to the Fifth Amendment to the United States Constitution.

Respondents moved to dismiss the complaint. The District Court granted the motion to dismiss

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[1] The Rural Housing Administration, requested and obtained permission to condemn nearby land. Afterwards, Rural Housing Administration, under color of State law, built improvements on the properties belonging to HPY, notwithstanding an injunction granted in favor of HPY prohibiting any further acts to be taken on HPY's land. (App. at ~~A-59~~ A-105).

the complaint on October 7, 1992. In doing so, it held that HPY had not specified with particular certainty its claim under section 1983 and that the complaint failed to satisfy Rule 8 of the Federal Rules of Civil Procedure, on the most basic level.

The Court of Appeals affirmed on essentially the same grounds adding that there was no constitutional violation so long as local law affords a remedy for any tortious misconduct if defendants (here respondents) were not authorized by local law or regulation for their actions. (App at ~~A-3~~ A-4).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY AMONG THE COURTS OF APPEAL THE APPLICABILITY OF WHETHER *CHARLENE LEATHERMAN V. TARRANT COUNTY* APPLIES WHERE A PLAINTIFF PLEADING A

42 U.S.C. § 1983 IS NOT REQUIRED TO PLEAD TO A HEIGHTENED PLEADING STANDARD BASED ON RULE 8(A)(2) AND 9(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner's HPY Inc. filed a 42 U.S.C. § 1983[2] action claiming a violation of their

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[2] 42 U.S.C. § 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

By the plain terms of section 1983 **two and only two** allegations are required in order to state a cause of action under the statute:

> 1. **The plaintiff must allege that some person has deprived him of a federal right.**
>
> 2. **The plaintiff must allege that the person who has deprived him of that right acted under color of state or territorial law..**

constitutional rights to Due Process under both the Fourteenth and Fifth Amendments of the United States Constitution.

In the District Court, respondents did not file an answer to HPY's complaint. They moved, instead, for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court granted that motion, pointing out that the court has been "particularly insistent in section 1983 cases to require a fair degree of specificity -- a foundation of material facts -- to survive a motion to dismiss."[3] Further stating that the court found the complaint insufficiently developed to determine whether such federal question jurisdiction exists stating that the complaint fails to satisfy the pleading requirements of Federal Rule of Civil Procedure

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[3] The District Court rested its analysis of the degree of specificity that section 1983 claims should be pled to by using the First Circuit's holdings of *Dewey* v. *University of New Hampshire*, 694 F.2d 1, 3, *cert. denied*, 461 U.S. 944 (1982), and *Gilbert* v. *Cambridge*, 932 F.2d 51, 62, *cert. denied*, 112 S.Ct. 192 (1991).

Rule 8 on the most basic level.

On appeal, a First Circuit panel affirmed the dismissal; it, too relied on the District Courts case analysis and failing to address the issues of due process, summarily addressed the issue of the takings claim pursuant to the Fifth Amendment and relying on *Williamson County*, dismissed the claim until HPY Inc. had first sought just compensation or had exhausted all available state remedies.

For purpose of review of a Rule 12(b)(6) dismissal, the court was required to accept the material facts alleged in the complaint as true,[4] and was not to dismiss "unless it appeared beyond doubt that the plaintiff could not prove no set of facts in support of his claim which would entitle him to relief.[5]"

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[4] *Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030,

[5] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Certainly the District Court should not dismiss a complaint without granting leave to amend at least once when a liberal reading of the complaint gives an indication that a valid claim might be stated.[6] The respondents argue that the complaint failed to set forth specific facts to support its general allegations of civil rights violations pursuant to the Due Process Clause of the Fourteenth and Fifth Amendments and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's

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[6] *See Fed. R. Civ. P. 15(a)* (Leave to amend "shall be freely given when justice so requires") 3 Moore's Federal Practice para. 15.08[4], at 15-65 (2d ed. 1990); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222, (1962).

claim is and the grounds upon which it rests.[7]"

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Id. at 2 L.Ed.2d 86.* Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. *Id.*

The "heightened pleading" requirement directly conflicts with the system of "notice" pleading mandated by the Federal Rules of Civil Procedure and the Supreme Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957). *Charlene*

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[7] Rule 8(a)(2); *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 85

Leatherman, et al., v. Tarrant County Narcotics Intelligence and Coordination Unit et al., 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).[8]

To the extent Federal Rule of Civil Procedure 8(a)(2) can be construed to require greater factual specificity for a plaintiff's allegations depending on "the nature of the claim" presented, Rule 8(a)(2) violates that part of the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that the Congressional delegation of rulemaking authority to the Supreme Court does not include the power to

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[8] In *Leatherman*, the Supreme Court held that a federal court may not apply a "heightened pleading standard" more stringent than the usual pleading requirements of Federal Rule of Civil Procedure 8(a) in civil rights cases alleging municipal liability under § 1983. Stating further that "it is not possible to square the heightened standard applied in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." And while Rule 9(b) requires greater particularity in pleading certain actions, it does not include among the enumerated actions any reference to complaints alleging municipal liability [or for that matter public corporation liability] under § 1983." 61 LW 4205.

adopt rules that "abridge, enlarge or modify any substantive right."

By imposing solely upon plaintiffs bringing suit under 42 U.S.C. § 1983 the burden of pleading evidence to support their claims prior to discovery, the heightened pleading requirement effectively nullifies, and thereby "abridges," the remedial right provided under Section 1983 when evidence necessary to satisfy the heightened pleading requirement remains in the exclusive possession of a defendant.

Moreover, any assumption that greater specificity was intended under the rules depending on the particular "nature of a claim" is also refuted by the fact that when the drafters wanted to require greater specificity in pleading, they knew how to do it. Rule 9(b) of the Federal Rules of Civil Procedure expressly requires greater factual specificity only for claims alleging fraud or mistake. By

negative implication, it is therefore clear that neither the Advisory Committee, the Supreme Court, nor Congress intended to require that Civil Rights plaintiffs plead their claims with greater factual particularity than other claimants generally.

At the pleading stage, a judge "must guess" whether the plaintiff, if allowed discovery, will be able to gather evidence to support his claims. Uninformed judicial speculation is not an adequate means of arriving at correct decisions on the merits.[9]" In light of the First Circuits affirmance of the District Courts order and its repeated adherence to its standard that section 1983 must be pled specifically[10], The Supreme Court should grant the petition to

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[9] *Marcus*, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 483 (1986).

[10] *Dewey* v. *University of New Hampshire*, 694 F.2d 1,3, *cert. denied*, 461 U.S. 944 (1982); *Gilbert v. Cambridge*, 932 F.2d 51, 62, *cert. denied*, 112 S.Ct. 192 (1991).

resolve a split among the courts of Appeals in light of *Leatherman*.

II. THE PETITION SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OUTLINED IN *ZINERMON V. BURCH* WHEN HIGH-LEVEL PUBLIC CORPORATION OFFICIALS EXERCISE BROADLY DELEGATED POWER AND AUTHORITY TO EFFECT THE DEPRIVATION OF A PROTECTED PROPERTY INTEREST, NOTWITHSTANDING THEIR OBLIGATION TO IMPLEMENT PROCEDURES TO PREVENT THE DEPRIVATION COMPLAINED OF.

HPY's complaint alleged denial of its rights to procedural due process by the former administrators of the Rural Housing Administration, Aqueduct & Sewer Authority, and the Electric Power Authority.

In particular, it claimed the right to a predeprivation hearing prior to the taking of its property. The Court of Appeals decision below relied principally upon *Williamson County* v. *Hamilton Bank*, 473 U.S. 172 (1985). Citing *Williamson County*, the Court of Appeals concluded that HPY "had no constitutional violation so long as local law affords a remedy for any tortious misconduct." (Opinion App. at A-4 ~~A-3~~). The Court of Appeals, however, failed to address the fact that it was the senior officials of the various agencies which induced the agencies themselves, to personally effect the deprivation complained of.

These high-level officials were not only authorized to effect the deprivation complained of[11], but they were also charged with

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[11] Title 22, Chapter 9, Aqueduct and Sewer Authority, § 144(e), Laws of Puerto Rico Annotated. Title 22 Chapter 11, Electric Power Authority § 196(h), Laws of Puerto Rico Annotated. Title 28, Chapter 51, Rural Housing Administration §§ 525, 526, Laws of Puerto Rico Annotated.

responsibility to see that appropriate process was provided to HPY to prevent the deprivation. As such, the Court of Appeals' reliance on *Williamson County* and *Hudson v. Palmer*, 468 U.S. 517 (1985), was misplaced and its decision is inconsistent with the Supreme Court's more recent decision in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990).

At the core of the due process clause is the right to notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545,552,85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Ordinarily, due process of law requires an opportunity for some kind of hearing *prior* to the deprivation of a significant property interest. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30 (1978) (emphasis added). Only in extraordinary circumstances involving "the necessity of quick action by the State or the impracticality of providing any

[meaningful] predeprivation process" may the government dispense with the requirement of a hearing prior to the deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982) (quoting *Parratt v. Taylor*, 451 U.S. 527, 539, 101 S.Ct. 1908, 1914-15 68 L.Ed.2d 420 (1981)).

The Commonwealth of Puerto Rico had given respondents the legislative authority to deprive HPY Inc. of its property provided that they did so by **any lawful means (including, but without limitation, the exercise of the power of eminent domain)**, (emphasis supplied).[12] Respondents, were acting as the State, and since they were in a position to give HPY notice and a hearing, and failed to do so, the State itself was then in a position to provide predeprivation process and

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[12] Title 22, Chapter 9, Aqueduct and Sewer Authority, § 144(e), Laws of Puerto Rico Annotated. Title 22 Chapter 11, Electric Power Authority § 196(h), Laws of Puerto Rico Annotated. Title 28, Chapter 51, Rural Housing Administration §§ 525, 526, Laws of Puerto Rico Annotated.

it too failed to do so.[13]

HPY claims that they are entitled to receive the procedural safeguards provided by Puerto Rico's Eminent Domain Procedure, and that respondents violated HPY's due process rights by failing to initiate this procedure.

In the procedural due process context, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due

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[13] Several Courts of Appeals have found *Parratt* inapplicable where the defendant state officials had the state-clothed authority to effect a deprivation, and had the power to provide the plaintiff with a hearing before they did so. *See, Watts v. Burkhart*, 854 F.2d 839, 843 (CA6 1988); *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 382 (CA7 1988); *Fetner v. City of Roanoke*, 813 F.2d 1183, 1185-1186 (CA11 1987); *Freeman v. Blair*, 793 F.2d 166, 177 (CA8 1986); *Patterson v. Coughlin*, 761 F.2d 886, 891-893 (CA2 1985), cert. denied, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (CA9 1985) (en banc); *Wolfenbarger v. Williams*, 774, F.2d 358, 363-365 (CA10 1985).

process of law. *Zinermon v. Burch*, 494 U.S. at 125, citing *Parratt v. Taylor*, 451 U.S. at 537.

Accordingly, the violation of procedural due process is not complete when the deprivation occurs, and it is does not become complete unless and until the state fails to provide procedural due process. *Id.* To determine whether, as respondents contend, the *Parratt* rule necessarily precludes § 1983 liability in this case, you must ask whether predeprivation procedural safeguards could address the risk of deprivation of the kind HPY alleges. To do this, you examine the risk involved.

The risk is that some persons or agencies who go onto private lands will apparently be taking those lands without first giving notice or an opportunity to be heard to the rightful owners. Indeed, the very nature of the acquisition of private property for public use projects makes it foreseeable that a person or

agency would unlawfully deprive an owner of his property rights without adequate notice. Such a person thus is in danger of losing his property rights indefinitely without benefit of the procedural safeguards of the condemnation process, a process specifically designed to protect land owners of deprivations of their property interests without just compensation.

It may be permissible constitutionally for a state to have a statutory scheme like Puerto Rico's, which gives respondents broad power and little guidance in acquiring private property for public use. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of property, the respondents cannot then escape liability by invoking *Parratt* and *Hudson*. *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. at 988, 108 L.Ed.2d 100 (1990).

The requirements of procedural due process apply only to the deprivations of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property. *Id. at 110 S.Ct. 983.*

In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.[14]

Respondent's cannot escape § 1983 liability by characterizing their conduct as a "random,

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[14] *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. at 987, citing *Loudermill*, 470 U.S., at 452, 105 S.Ct. at 1493; *Memphis Light*, 436 U.S. at 18, 98 S.Ct. at 1564; *Fuentes*, 407 U.S. at 80-84, 92 S.Ct. at 1994-96; *Goldberg*, 397 U.S. at 264, 90 S.Ct. at 1018.

unauthorized" violation of Puerto Rican Law which the Commonwealth was not in a position to predict or avert, so that all the process HPY could possibly be due is a postdeprivation damages remedy.

According to the allegations in the complaint, HPY was deprived of a substantial property interest without either adequate notice or an opportunity to be heard by the very officials charged with the power to deprive landowners of their property and the duty to implement procedural safeguards. Such a deprivation is foreseeable, due to the nature of the taking, and will occur, if at all, at a predictable point in the taking process. *Zinermon v. Burch, 110 S.Ct. at 990.*

Unlike *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due

because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged. *Id.*

The interpretation of § 1983 articulated in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (overruled in part not relevant here, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 664-689, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)), stated that the Supreme Court had rejected the view that § 1983 applied only to violation of constitutional rights that were authorized by state law, and did not reach abuses of state authority that were forbidden by the State's statutes or Constitution, or were torts under the State's common law.

It explained that § 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violation of civil rights "where

state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." *Id.*, at 173-174, 81 S.Ct., at 476-77.[15]

Section 1983 does, however, protect against the deprivation of a property interest "whenever the State seeks to remove or significantly alter" the status of liberty or property interests recognized by state law.[16] Additionally, there are other interests, of course, protected not by the virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been

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[15] The Court said: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*, at 183, 81 S.Ct., at 481. Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.

[16] *San Jacinto Sav. & Loan* v. *Kacal*, 928 F.2d 697, 701 (CA5 1991).

'incorporated'into the Fourteenth Amendment.

Section 1983 makes a deprivation of such rights actionable independent of State law.[17]

Predeprivation process was not impossible here. Puerto Rico has a procedure for the taking of land, but only the highest officials of the respondent agencies are in a position to take notice of any misuse of the delegated eminent domain power and to ensure that the proper procedures are afforded to those landowners whose land is adversely affected by the taking.

In addition, respondent's conduct was not unauthorized within the meaning of *Parratt* and *Hudson*, since the Commonwealth of Puerto Rico had delegated to these agencies the power and authority to deprive landowners of their

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[17] *Id.* at p. 710 n. 5, 96 S.Ct. at 1165 n. 5 (citing *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)).

property and the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful takings. *Zinermon v. Burch*, 494 U.S.113, 110 S.Ct. 975, 977 (1990).

Petitioner submits that *Hudson & Williamson County* are inapposite and that an analysis indicated by *Zinermon* should govern situations such as the one presented in the case below. The petition should be granted to clarify the requirements of procedural due process in predeprivation takings to the extent to which the *Zinermon* analysis has narrowed *Hudson* with respect to the denial of procedural due process by high-level officials.

III. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE COURT OF APPEALS ON THE ISSUE OF WHETHER SUBSTANTIVE DUE PROCESS CLAIMS AND TAKINGS CLAIMS SHOULD NOT

BE HELD TO THE SAME RIPENESS STANDARD AS OUTLINED IN *WILLIAMSON COUNTY*.

Petitioner alleged that the respondents violated its rights to substantive due process when through the Rural Housing Administration, Aqueduct & Sewer Authority and the Electric Power Authority, arbitrarily and capriciously provided utility service and other structures to squatters which had invaded HPY's land. The First Circuit Court of Appeals relied principally on the rationale of *Williamson County* to review the ripeness of the claim before it's court.

The First Circuit Court of Appeals erroneously applied a *Williamson County* ripeness standard with respect to the claims presented to the District Court and then to those issues presented on appeal.[18] The First Circuit Court

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[18] This Court held that there were two ripeness requirements, finality and exhaustion of available state remedies.

of Appeals decided that HPY had to exhaust all available state remedies prior to bringing the case to Federal District Court. However, the District Court dismissed the action with prejudice as to our claim under 42 U.S.C. § 1983 but failed to address the issues of substantive and procedural due process. Based on this, the First Circuit Court of Appeals affirmed the decision of the District Court and then erroneously applied a *Williamson County* ripeness standard. The error therein lies with treating substantive due process and procedural due

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Finality, is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete type injury. *Williamson County*, 473 U.S. at 193. However, regardless of the type of claim, it is generally impossible to determine the extent of the infringement absent a final determination by the relevant government body. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F. 2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). The second requirement, exhaustion of available state compensation remedies, states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking. *Id.* The Supreme Court held in *Williamson* that the issues of Procedural Due Process and Substantive Due Process were not issues before the Court. 473 U.S. at 195-96 n. 14, 105 S.Ct. at 3121 n. 14

process claims with those of takings claims pursuant to the Fifth Amendment to the U.S. Constitution. It is possible for Due Process claims and Takings Claims to emanate from the same set of facts, but to hold the Due Process Claim to the second prong of the Takings Claim as discussed in Williamson is unjustifiable.

Indeed, the Supreme Court in *Williamson County* expressly distinguished procedural due process claims from taking claims, stating that due process may be violated regardless of the availability of post-deprivation remedies. *See Williamson County* 473 U.S. at 195-96 n. 14, 105 S.Ct. at 3121 n. 14.

In *Williamson County*, the Supreme Court applied the finality prong of the ripeness analysis, just as it had for the just compensation claim. This rationale is not applicable to an as applied arbitrary and capricious due process claim. Such a claim

regarding a property owners rights have been violated the moment the government acts in an arbitrary manner and that arbitrary action is applied to the owners property. *Greenbriar v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989). Even if the government pays just compensation, a property owners rights are violated the moment a governmental decision affecting his property has been made in an arbitrary and capricious manner. Id. at 1574.

The first ripeness prong of *Williamson County* (requirement of final decision), while applicable to most substantive due process claims arising out of alleged regulatory takings is not relevant to a physical taking claim because there are no administrative avenues of relief to exhaust: the taking itself firmly establishes the extent of the deprivation. *Sinaloa Lake 882 F.2d 1398* at 1407.

State post-deprivation remedies are of no consequence in the context of substantive due process actions brought under § 1983. Substantive due process violation, unlike procedural due process violations, are complete when the wrongful action is taken. *Zinermon v. Burch*, 494 U.S. at 125. A plaintiff "may invoke § 1983 regardless of any state tort remedy that might be available to compensate him for the deprivation of these [substantive due process] rights." *Id.*, (citing *Monroe v. Pape*, 365 U.S. 167 (1961)). Thus, any suggestion that state post-deprivation remedies obviate a substantive due process claim is clearly erroneous.

If government action constitutes a permanent physical occupation of property, there is "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

435-35, 73 L.Ed.2d 868, 102 S. Ct. 3164 (1982)[19]. This type of taking, requiring courts to apply a per se rule, has been termed a "physical taking," *see Yee v. City of Escondido* 112 S.Ct. 1522, 1527, and stands in contrast to the fact intensive inquiry accompanying a judicial determination of whether a "regulatory taking" has occurred.

On a general level, substantive due process protects against arbitrary government conduct. *United States v. Certain Real Property*, 954 F.2d 29, 33 (2d Cir.) (citing *Daniels v. Williams*, 474 U.S. 327, 331, 88 L.Ed.2d 662, 106 S.Ct. 662

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[19] *Loretto* helps to define what constitutes a physical taking. In *Loretto*, the Court reviewed a New York law that required a landlord to permit a cable company to install cable equipment on his building. The Court held that the permanent cable installation on the landlord's building was a permanent appropriation of a portion of the landlord's property and, therefore, constituted a physical taking, even though it displaced only approximately one-half of a cubic foot of property. *Loretto*, 458 U.S. at 438 & n. 16. The *Loretto* Court explained that a permanent physical occupation occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. *Id.*

(1986)), petition for cert. filed (April 20, 1992).

Because *Williamson County* involved a takings claim but not a substantive due process claim, lower courts faced with both a takings claim and substantive due process claim based on property have had to determine the applicability of the *Williamson County* just compensation requirement to substantive due process claims without explicit guidance from the Supreme Court. In particular, the Courts of Appeals for the First and Ninth Circuits have addressed this issue and reached different results.[20] The most

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[20] The Ninth's Circuit's approach to the just compensation issues can be seen in two cases, *Sinaloa Lake owners Association v. City of Simi Valley*, 882 F.2d 1398 (Ninth Circuit 1989), *cert. denied* sub nom. *Doody v. Sinaloa Lake Owner's Association*, 110 S.Ct. 117 (1990).; and *Bateson v. Geisse*, 857 F.2d 1300 (Ninth Circuit 1988). In each case, property owners alleged that a particular governmental act constituted both a taking and a deprivation of substantive due process. In both cases the plaintiffs had not pursued just compensation at the state level for either their takings or their substantive due process claim. Both courts ruled that, because the plaintiffs had not sought just compensation, the takings claims were unripe under the just compensation requirement of

obvious problem with requiring that a litigant pursue just compensation in order to have a ripe substantive due process claim is that there seems to be no basis for such a rule in the language of the Fourteenth Amendment.[21] The takings clause of the Fifth Amendment specifically refers to just compensation; the due process clause of the Fourteenth Amendment

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Williamson County. The courts also ruled, though, that the substantive due process claims were ripe because substantive due process claims are not subject to the just compensation requirement.

The First Circuit's holding in *Culebras Enterprises Corp. v. Rivera Rios*, 813 F.2d 506 (1st Cir. 1987) and *Ochoa Realty Corp. v. Faria*, 815 F.2d 812 (1st Cir. 1987) also involved plaintiffs who claimed that certain acts by the government had both violated their substantive due process rights and amounted to a taking without just compensation. In these cases, the First Circuit held that both claims were not ripe because the plaintiffs had not sought just compensation in state proceedings. The *Culebras* holding (which the court quoted and followed in *Ochoa*) stated that "there can be no violation of substantive due process...at least until the state inverse condemnation proceeding is resolved." See *Culebras* at 516; see also *Ochoa* at 817 n.4. Thus, the First Circuit requires that, in order for a plaintiff to have a ripe substantive due process claim, he must first pursue just compensation at the state level.

[21] U.S. Constitution, 14th Amendment § 1.

does not include any language about compensation. The first portion of each clause outlines a governmental power, namely, the power to deprive of life, liberty, or property and the power to take land; and the second portion of each clause places a limitation on that power, namely, that life, liberty or property can be deprived only if there is due process of law, and that land can be taken only if just compensation is given. There is no requirement that due process be violated for a taking to occur, nor that just compensation be denied for a deprivation of life, liberty, or property to occur. Just compensation is thus relevant to a taking but irrelevant to a deprivation of substantive due process.

There is also a danger of preclusion under the First Circuit's approach: state rulings on substantive due process might have a preclusive effect, thereby denying HPY a federal forum for their federal claim. Under 28 U.S.C. § 1738,

the federal courts are bound by a state determination and cannot hear a given claim if the state accords a preclusive effect to its adjudication of that claim.[22]

Because the Supreme Court has ruled that section 1983 is not an exception to 28 U.S.C. § 1738[23], state adjudication of a section 1983 claim has the same preclusive effect in federal court as it would in a state court. Furthermore, the Supreme Court has held that, regarding section 1983 claims, federal courts "must give [administrative] factfinding the same preclusive effect to which it would be entitled in the State's courts.[24]" Thus, if a state court adjudicates a given claim and assigns a

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[22] For a delineation of the elements of preclusion (and of the bases for a court's assigning preclusive effect to its adjudication), see W. FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL 11-30 (1988).

[23] See *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980).

[24] *University of Tenn. v. Elliot*, 478 U.S. 788, 799 (1986).

preclusive effect to its determination, the federal courts are bound by that decision and cannot hear the claim, even if the proceeding was merely an administrative hearing.

Because the First Circuit's approach potentially deprives HPY of the ability to enter federal court, it prevents the effectuation of concurrent jurisdiction. The Supreme Court has interpreted section 1983 to provide for concurrent jurisdiction in the federal and state courts over constitutional claims.[25] Thus a plaintiff with a ripe section 1983 claim should be able to choose whether to bring his claim in state or federal court.

If, however, a state's preclusion rules prevent a plaintiff from entering federal court after a state proceeding, then the plaintiff has been denied his choice of forum. Irrespective

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[25] *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980); *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961).

of the state courts' adequacy to hear substantive due process claims, sending such claims to state courts prevents plaintiffs from exercising the choice that is the basis of concurrent jurisdiction.

Section 1983 was written specifically to avoid such a result by ensuring that a federal forum would be accessible.[26] Thus, insofar as a requirement that a plaintiff utilize state proceedings prevents the plaintiff from entering federal court with federal claims, the requirement frustrates the purpose of section 1983 by denying concurrent jurisdiction.[27]

Another problem with the First Circuit's

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[26] See *Monroe*, 365 U.S. at 183 ("The federal remedy [under section 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.")

[27] It is plaintiffs, not defendants, who choose between state and federal fora when there is concurrent jurisdiction. But when a plaintiff's claims are sent to a forum that he did not choose, he has been denied the choice of forum that is inherent in concurrent jurisdiction.

rule is that the opinions in *Culebras* and *Ochoa* do not articulate any criteria that would allow only property-based substantive due process claims to be sent to state court. Their failure to distinguish among substantive due process claims suggest that all rights protected by that clause, including life and liberty, could be deprived as long as the state gives just compensation. This is too dramatic of an undertaking merely because of a desire to raise the ripeness requirements for takings-related substantive due process claims.

Sending substantive due process claims to state courts does not comport with the Constitution and frustrates its precepts: under the Fourteenth Amendment and section 1983 federal courts are open to plaintiffs who are aggrieved by states, and if courts fabricate constitutional doctrines to avoid such plaintiffs, they have violated the spirit of the Constitution.

Therefore, the Supreme Court should grant the petition to resolve the split of authority differentiating the ripeness of substantive due process claims with those of takings claims.

IV. THE PETITION SHOULD BE GRANTED TO CLARIFY AN ERRONEOUS APPLICATION OF WILLIAMSON COUNTY TO A TAKINGS CLAIM WHERE ALL AVAILABLE STATE REMEDIES HAD BEEN EXHAUSTED.

HPY's complaint also alleged a deprivation of its property without just compensation pursuant to the Fifth Amendment of the United States Constitution. The Court of Appeals' decision below was thus properly premised on an analysis of *Williamson County*.

The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation...all that is required is that

a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. *Williamson*, 105 S.Ct. at 3121. The Court went on to analogize to *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), its holding that a property owner has not suffered a violation of the just compensation clause until after the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the state.

In *Williamson County Regional Planning Commission v. Hamilton Bank, 473 US 172*, the United States Supreme Court held that a takings case is not ripe for federal court litigation until compensation has first been sought and refused in state courts, if the state courts will consider an action for compensation. The Supreme Court held in *Williamson County* that if a State provides an adequate procedure for seeking just compensation, the property owner

cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson County places two hurdles in the way of a takings claim brought in federal court against states and their political subdivisions. First, *Williamson County* affirmed the principle that "a claim that the application of government regulation effects a taking of property interest is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue." *Id. at 186, 105 S.Ct. at 3116.*

The second, and independent, hurdle established by *Williamson County* requires plaintiffs to "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts." *Id. at 194-95, 105 S.Ct. at 3120-21.*

The complaint and subsequently the record on appeal to the First Circuit Court of Appeals clearly stated that HPY had first sought an intervention on a state condemnation claim because adjoining property to that of HPY had also been invaded by squatters; said intervention was denied.[28] Subsequent to the denial, an eviction proceeding was conducted in the Superior Court of Ponce, Puerto Rico, and it was there that the court rendered a judgment in favor of HPY.[29] However, because HPY land had been developed by the respondents to such an extent that it was impracticable to remove the

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[28] App. at ~~A-35~~ A-58.

[29] App at ~~A-59~~ A-105. A Judgment was rendered on June 4, 1991 by the Superior Court of Ponce, Puerto Rico, which stated:

> "all defendants and all others who had constructed structures had to **CEASE AND DESIST** from hindering the plaintiffs from the possession of the property which was the subject of litigation." (emphasis original)

The judgment was published in a newspaper of general circulation on June 6, 1991 and mailed to The Secretary of the Department of Housing Administration. (App at ~~A-61~~ A-108).

individual squatters one by one, HPY filed an inverse condemnation claim against the Commonwealth of Puerto Rico.

On the belief that the Commonwealth of Puerto Rico would include HPY in its expropriation proceedings, HPY requested a voluntary dismissal of its inverse condemnation claim without prejudice, which was granted by the Superior Court of Ponce, Puerto Rico but was granted with prejudice.

Thus having been denied intervention after HPY received a voluntary dismissal of its inverse condemnation claim with prejudice effectively precludes HPY's ability to request just compensation for land which was taken by respondents in direct violation of the Fifth Amendments Taking Clause. Therefore, HPY has effectively satisfied both prongs of *Williamson County* because a physical taking by the respondents, such as the one at issue here, is

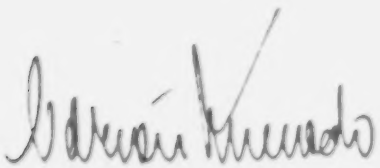
by definition a final decision. The fact also that HPY has sought and been denied every available state remedy affirmatively demonstrates that HPY had exhausted all available state remedies and it was error for the First Circuit Court of Appeals to affirm a decision of the District Court when a careful inspection of the record on appeal and a liberal reading of the complaint would have shown this as so.

The Supreme Court should grant the petition to clarify an erroneous application of *Williamson County* in cases where all available state remedies have been exhausted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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